U.S. DEPARTMENT OF LABOR
Office of the Assistant Secretary
for Administration and Management
CIVIL RIGHTS CENTER
200 Constitution Ave, NW, Room N-4123
Washington, DC 20210

AUG 12 2003

Mr. Sule Issifu
Equal Opportunity Officer
Arizona Department of Economic Security
1789 W. Jefferson
Phoenix, AZ 85005

Dear Mr. Issifu:

Thank you for your recent letter which provided the names of the newly elected Governor of Arizona and the Acting Director and interim Program Administrator for the State's Department of Economic Security. We will update our records accordingly.

We were pleased to hear that your Methods of Administration training conference went well. I do regret that our schedules did not permit me or my staff to participate in the event. However, as agreed, we welcome the opportunity to provide responses to questions that were not answered at the conference.

The following discussion provides responses to all but two of the questions we received from your training contractor, TATC Consulting. The two questions to which we do not respond deal with identifying people with disabilities on "the MIS form," and deleting questions about disabilities from "application forms." These questions raise issues that the Department of Labor is still considering. We will provide a response to those questions at a later date.

The other questions, and our responses, are set forth below. The questions are verbatim as received and are in bold text, followed by our answers to each question.

Question: **Did the Federal government exempt itself from ADA compliance? Or, does this fall under some other rule/guideline? If they are exempt, why?**

Answer: The Federal government is not covered by the provisions of the Americans with Disabilities Act (ADA). However, the Federal government has been required since 1973 to comply with various provisions of the Rehabilitation Act that not only bar discrimination against people with disabilities, but require the government to take affirmative action to employ them. *See* Sections 501(b), 504(a), and 505 of the Rehabilitation Act, 29 USC 791(b), 794(a), and 794a(a)(1) (as amended).

In addition, Federal regulations apply architectural and programmatic accessibility standards to the U.S. Department of Labor (DOL) and its facilities that are very similar to those that apply to recipients of Federal financial

assistance. *Compare* 29 CFR 33.8, 33.9, and 33.10 *with* 29 CFR 32.27 and 32.28. Other Federal regulations apply similar standards to other Federal agencies.

Finally, the recent amendments to Section 508 of the Rehabilitation Act imposed strict standards on the Federal government for the accessibility of electronic and information technology. *See* 29 USC 794d. Congress has not imposed these standards on State or local governments or on the private sector.

Therefore, far from "exempting" the Federal government from laws protecting people with disabilities, Congress has held the Federal government, at least in some respects, to an even higher standard than the one to which it has held State, local, or many private-sector entities.

Question: **Should separate files be kept on ethnicity, race and medical information? Here, the issue is about whether you literally need separate files, or is it ok if there is only one file but it is a secure file that only the relevant people have access to? Some participants seemed frustrated by the idea that there might be all these different files for the same person. Do you need one case file without race/disability info, and another with race and disability, and then a separate medical file too?**

Answer: The answer to this question will make sense only if you understand the difference between demographic data and other disability-related data about a customer, applicant for employment, or employee. The WIA nondiscrimination regulations require that demographic data (basic information about race, sex, age, and where known, disability status) be collected about every applicant, registrant, eligible applicant/registrant, participant, terminee, applicant for employment, and employee. The regulations require that this data be stored "in a manner that ensures confidentiality." 29 CFR 37.37(b)(2). The regulations do not specifically require that this data be kept separate from other information about a particular person; they simply require that the data be kept confidential. Therefore, demographic data collected about a particular person may be stored in the same file as other information about that person, as long as two conditions are met. First, access to the file, or to the part of the file containing the data itself, is limited to those persons who have a legitimate need for that data. Second, the data must not be used for improper purposes, such as making discriminatory decisions about the services or employment the person will receive.

The requirements for storage of other types of disability-related information about individual employees, applicants for employment, and customers are in a different section of the WIA nondiscrimination regulations. That section is 29 CFR 32.15(d), which *does* require that disability-related and other medical information about a particular individual be kept in a separate file. The section also lists the limited categories of persons to whom, and the limited circumstances under which, this information may lawfully be revealed.

Question: **Because we use public funds, should the public have access to Participant files?**

Answer: No. The public does not have a right to open access to participant files.

Question: Are faith-based initiatives allowed to serve only religious members? What about hiring issues? Can a faith-based recipient decide not to hire a person of another faith for a service provision position? Are faith-based thus exempt from these rules? Wasn't there a presidential statement on this?

Answer: We assume that your question refers to "faith-based initiatives" that are part of the One-Stop delivery system. These institutions are considered recipients of financial assistance under WIA Title I, and as a result are *not* permitted to discriminate on the basis of religion in deciding which customers to serve.

With regard to employment, the rules are not as clear-cut. Under the current language of WIA Section 188 and the WIA nondiscrimination regulations, whether a faith-based institution is permitted to base employment decisions on religion will depend on the particular job(s) involved in the decision. Section 188 bars recipients of Federal financial assistance -- including religious organizations -- from making religious-based employment decisions, but *only* "in the administration of, or in connection with," the programs or activities that received the financial assistance. So, under current law, a faith-based institution may *not* use religion as a criterion for employment in the programs or activities that receive the financial assistance, but *may* hire, promote, or make other employment decisions on the basis of religion for *other* programs or activities. We understand, however, that the statute and/or regulations may be revised in the near future to permit these religious organizations to make religious-based employment decisions in *all* of their programs and activities.

When considering the current legal limitations on religious-based employment decisions, it is important to remember that under the law, "financial assistance" includes much more than simply dollars and cents. The term also includes in-kind assistance, such as free or reduced-rate use of Federal personnel or One-Stop property. Programs and activities that receive such in-kind assistance fall under the prohibition of religious-based employment decisions.

The "presidential statement" that you refer to is probably Executive Order 13279, issued by President George W. Bush on December 12, 2002. That Order, entitled "Equal Protection of the Laws for Faith-based and Community Organizations," requires the Federal government to deal fairly with faith-based organizations, and also prohibits faith-based organizations that receive Federal financial assistance from discriminating against beneficiaries on the basis of religion.

Section 4 of Executive Order 13279 amends a different Executive Order (Executive Order 11246)to permit faith-based organizations that are Federal contractors to choose their employees on the basis of religion. However, the definition of "Federal contractor" is narrow; it is limited to organizations or other entities that enter into contracts with Federal agencies. Those contracts must be "for the purchase, sale, or use of personal property or nonpersonal services." Organizations that merely receive financial assistance from the Government are

not "Federal contractors," and are not covered by the amendment. As of the date of this letter, the hiring standards that apply to faith-based organizations that are recipients of WIA Title I financial assistance have not changed.

If you are interested in reading Executive Order 13279, the Order has been published in the Federal Register. The citation for the Order is 67 FR 77139 (December 16, 2002). The text is also available on the White House website at www.whitehouse.gov.

Question: **What is a "small" recipient? e.g., there is a formula for determining this, what is the formula? We actually found the formula in the regulations before we left. However, clarification from CRC would be better. I think the concern centered around tribal service locations.**

Answer: The WIA nondiscrimination regulations define the term *small recipient* in 29 CFR 37.4. Under that definition, a *small recipient* means a recipient that:

a) Serves a total of fewer than 15 beneficiaries during the entire grant year; *and*
b) Employs fewer than 15 employees on any given day during the grant year.

In other words, if there is any day during the grant year on which the recipient has 15 employees (or more), that recipient does not qualify as a small recipient. There is no exception to this definition for recipients serving Indian, Alaska Native, or Native Hawaiian populations.

Question: **Should participants sign a copy of the EEO notice 37.31 to be kept in their file? Here the issue is whether they literally need a signed copy of the notice in the file, OR whether it's ok to have another form of proof that demonstrates the people have reviewed it. One person noted that there are several documents that people are supposed to sign to indicate that they've seen them. So, they developed a piece of paper that says, "My signature next to each document certifies the fact that I have reviewed and understand each of the following documents..." (or something like that) and then the paper just has a list of each of the various forms and they sign next to the name of the form to demonstrate that they've gotten this information. So, on that list might be "EEO Is the Law Notice" and they'd sign next to it to prove they got that. Is that OK, or do they literally need the signed form in the file?**

Answer: The WIA nondiscrimination regulations do not require that participants or employees sign a copy of the notice. Rather, the regulations require that the notice be "made available to each participant, and made part of each participant's file." 29 CFR 37.31(a)(4). Our understanding is that recipients who require participants or employees to sign a copy of the notice simply intend to create a documentary procedure that ensures that people in those categories have been advised of their rights. CRC's view is that recipients are free to develop whatever procedure for providing the notice that they wish, so long as they ensure that the notice of rights has in fact been provided to every participant, as well as

disseminated in every other way required by the regulations. However, because the regulations do require that the notice be "made part of the participant's file," a copy of the notice must be included in the file– whether or not that copy is signed.

We note that the question refers to the "EEO" notice. This reference is incorrect; the correct reference is to the "EO" notice. The initials "EEO" stand for the phrase "Equal Employment Opportunity," which, by its own terms, is limited to the employment context. By contrast, the initials "EO" stand for "Equal Opportunity," a concept that encompasses nondiscrimination in the provision of program benefits and services, as well as in employment.

Question: **Should taglines regarding TDD/TTY be on MIS cards, e-mail, etc?**

Answer: This question appears to confuse the concepts of "taglines" and TDDs/TTYs, both of which are covered in 29 CFR 37.34(a). The term "taglines" refers to the two specific notations that recipients must include on certain documents listed in that regulatory section (we will explain in the next paragraph of this answer the documents that are covered by this requirement). The taglines state that the relevant program or activity is an "equal opportunity employer/program," and that "auxiliary aids and services are available upon request to individuals with disabilities." The term "auxiliary aids and services" does include TDDs/TTYs, which are devices that allow people with hearing impairments (or other disabilities that limit their communication ability) to communicate by telephone. However, "auxiliary aids and services" also includes a wide range of other devices and services that may be used to communicate effectively with people who have various types of disabilities. The definition of "auxiliary aids or services" in 29 CFR 37.4 includes a list of examples.

29 CFR 37.34(a) requires that the taglines be used in or on all publications, brochures and other documents that market, promote, or otherwise give information about the programs and activities that a recipient provides, or about the requirements for participation in those programs or activities. The taglines must be included on all such documents, whether the documents are distributed or communicated to staff, clients, or the public at large.

To our knowledge, "MIS cards" are not generally used to provide information about programs, activities, or requirements for participation. Therefore, we assume that the "MIS cards" to which the question refers are used to collect data. If our assumption is correct, the taglines need not be included on these cards. Similarly, the taglines need only be included in e-mails when and if they are used to market, promote, or otherwise give information about a recipient's programs and activities, or about the requirements for participation.

The requirement regarding TDD/TTY information is a separate requirement, although it applies to the same documents as the taglines requirement. If those documents state that the recipient may be reached by phone (in other words, if they include a voice phone number for the recipient), they must also include the phone number for the recipient's TDD or TTY. If the recipient does not have a

working TDD or TTY, the documents must provide a phone number for a relay service that people with hearing impairments or other disabilities may use to contact the recipient. (29 CFR 37.9(c) requires that if a recipient uses a telephone to communicate with customers, employees, or applicants for employment, it must use either a TDD/TTY, or a relay service, to communicate with people with hearing impairments.)

Question: **Should Local Areas mediate EEO issues between participants on WIA-funded OJT and the employer? Also does the state complaint policy supercede that of the employer when WIA funds are involved? I think the second issue here was for things like complaint resolution. Some employers have something that says," all complaints will be handled through the employer's process." Some local areas have agreed to this in their OJT contracts. If so, do they then have to use the employer's process and not the EEO/WIA process?**

Answer: This question raises a number of interrelated issues. The best way for us to answer is to first give a brief overview of the regulatory requirements for the procedures that recipients must use to process discrimination complaints, and then respond to the specific issues raised in the question.

The regulatory requirements for the procedures are found in 29 CFR 37.70 through 37.80. Under the regulations, either the State (in the person of the Governor) or the LWIA grant recipient must develop complaint processing procedures for service providers to use. (The State's Methods of Administration, or MOA, should explain which entity will develop the procedures.) 29 CFR 37.77.

The regulations state that all complaint processing procedures must include Alternative Dispute Resolution (ADR) as a way of resolving a complaint. 29 CFR 37.76(b)(4). The regulations do not specify what type of ADR must be used; the choice is up to the entity that develops the procedures. The ADR method may be as formal as mediation, or as informal as permitting the parties involved to sit down in a room and try to work things out. However, the ADR method must be clearly described in the written complaint processing procedures that the State or LWIA grant recipient develops and publishes. 29 CFR 37.76(c).

Also, the choice whether to use ADR or the customary complaint-resolution process *must* rest with *the person(s) filing the complaint*. 29 CFR 37.76(c)(1). The respondent (the party that allegedly violated the nondiscrimination regulations) is *not* permitted to force the complainant to use the ADR procedure if the complainant does not wish to do so. Nor do the regulations permit a recipient to eliminate a complainant's option to choose the customary (non-ADR) process; all complaint processing procedures must provide both an ADR and a non-ADR option. 29 CFR 37.76(b)(3), (4), 37.76(c)(1).

In the circumstances described in the question, the employer would be the "respondent," and therefore would not be permitted to require a complainant to use ADR.

Similarly, both the LWIA grant recipient and the employer constitute "recipients" under the WIA nondiscrimination regulations, and therefore must follow the regulatory requirements for processing discrimination complaints. *See* definition of "recipient" in 29 CFR 37.4. Indeed, by accepting financial assistance under WIA Title I, both the employer and the LWIA grant recipient have agreed to follow the requirements for complaint processing procedures. The LWIA grant recipient was required to agree to an assurance that it would comply with 29 CFR part 37 as a condition for receiving WIA Title I financial assistance. This assurance automatically extends to "all agreements the grant [recipient] makes to carry out the WIA Title I-financially assisted program or activity," even if the assurance is not physically incorporated into, or included in, those agreements. 29 CFR 37.20(a)(1), (a)(2). Such "agreements" include contracts with OJT employers; therefore, the assurance is automatically part of the contract, and both parties that have signed the contract have thereby agreed to comply with the regulations, including the provisions relating to complaint processing procedures.

Moreover, the complainant has the legal right to file his or her complaint with CRC in the first instance, without going through the State's or LWIA's complaint-processing procedures. 29 CFR 37.71. Complainants must not be steered to a particular complaint process, and must not be limited in where they can file their complaint.

Therefore, participants cannot be required to use an OJT employer's complaint processing procedures (regardless of what the language of the contract states), and LWIA grant recipients should not enter into any contracts that contain language requiring recipients to do so.

Question: **Why does an eligible Training Provider have to sign assurance when they are just providing a service?**

Answer: Training providers receive Federal financial assistance in exchange for "providing a service." Under the definition in the WIA nondiscrimination regulations, "financial assistance" goes beyond money. It also includes the services of agency personnel, other in-kind types of assistance, and "any other agreement that has as one of its purposes the provision of assistance or benefits." 29 CFR 37.4, definition of "financial assistance." Training providers are therefore "recipients" under the regulations, and are therefore required to comply with those regulations, including the assurance provisions in 29 CFR 37.20.

I ask that you share these questions and answers with your Local Workforce Investment Area Equal Opportunity Officers and Section 504 Coordinators, as well as with all others who attended your Methods of Administration training conference. Based on our review of the training evaluations, we believe that the conference attendees could benefit from supplementary training, and we welcome the opportunity to work with you in this regard.

If you have any additional questions regarding the subjects discussed in this letter, please feel free to contact Gregory Shaw or Denise Sudell of my staff. Mr. Shaw may be reached at (202) 693-6540, or by e-mail at shaw.gregory@dol.gov. Ms. Sudell may be reached at (202) 693-6554, or by e-mail at sudell.denise@dol.gov.

Sincerely,

ANNABELLE T. LOCKHART
Director
Civil Rights Center